Nature, Conditions, and Legal Effects of Pre-Sale of Real Estate in Iranian and Canadian Law

1. Farhad Mortazavinejad : Department of Private Law, UAE.C., Islamic Azad University, Dubai, United Arab Emirates
2. Tayeb Afsharnia*: Department of Jurisprudence and Law, WT.C., Islamic Azad University, Tehran, Iran
3. Rahim Mohammadi Elami : Department of Private Law, Isl.C., Islamic Azad University, Iran, Islamshahr

***Correspondence: Afsharnia@iau.ac.ir**

Abstract

Modern life in the present era, in the realm of contracts—as in many other fields—has led to numerous and complex phenomena. One manifestation of this is the phenomenon of construction and the pre-sale contracts associated with it. The sale of buildings, real estate, and apartment units before construction is one of the common challenges in today's society, which depends on pre-sale or pre-construction contracts. The lengthy duration of construction projects and price fluctuations of building materials, particularly in light of current economic conditions, are among the major reasons for the expansion of pre-sale contracts in both Iran and Canada. This study, conducted using a descriptive-analytical method, aims to examine and identify the nature, conditions, and legal effects of pre-sale or pre-construction real estate contracts in Iranian and Canadian law. One of the findings of this research is that a pre-sale construction (real estate) contract, despite the absence of a sale at the time of its conclusion, can be considered equivalent to a sale. Compliance with the general conditions of transactions—namely, the intent and consent of the parties, their qualifications, the subject matter of the transaction, and the legality of the transaction—is essential.

Keywords: Construction order contract, pre-sale contract, istisna, sale, legal effects

Received: 20 January 2025
Revised: 25 April 2025
Accepted: 05 May 2025
Published: 30 June 2025

Citation: Mortazavinejad, F., Afsharnia, T., & Mohammadi Elami, R. (2025). Nature, Conditions, and Legal Effects of Pre-Sale of Real Estate in Iranian and Canadian Law. *Legal Studies in Digital Age*, 4(2), 1-10.

1. Introduction

With the increase in population in large cities due to the expansion of urbanization and the growing migration to cities, housing has now emerged as a basic necessity, and individuals have participated in its construction in a specialized manner, sometimes in the capacity of a legal entity (Kelly, 2016). Consequently, transactions and legal relations concerning housing have increased, with "real estate pre-sale contracts" being the most original and significant among them. On the one hand, there were buyers who could not afford to purchase a house in cash, and on the other hand, there were producers whose capital was insufficient for the construction of standard buildings. Therefore, they introduced real estate pre-sale and pre-construction contracts into the market. In this way, no financial pressure was imposed on the pre-buyers, and the builders were not faced

with capital shortages and liquidity problems. Thus, pre-sale and pre-construction contracts came into being (Hosseinzadeh & Sokouti, 2016).

Some problems with such contracts include the illegal sale of shared units to multiple buyers, fraud by the pre-seller, demanding amounts beyond what was stipulated in the initial contract, failure to precisely define the specifications and characteristics of the building units under transaction (for example, a luxurious district), and also the technical and architectural specifications as prescribed for that building, as well as repeated delays in timely fulfillment of contractual obligations, which often cause harm to the pre-buyer (Simiyeh Davarpanah Bordar & Rahmani, 2022). As a result, such contracts are informally drafted between the seller and the pre-buyer in an incomplete manner, leading to various claims such as bad checks, prohibition of construction operations, insurance claims, claims from building material suppliers, and laborer claims, among others. These problems can be partly resolved with the enactment of the Building Pre-Sale Law. Therefore, the registration of building contracts at notary public offices has been made mandatory, and accordingly, this study examines the nature, conditions, and legal effects of real estate pre-sale contracts in Iranian and Canadian law.

2. Pre-construction (pre-sale) contract and its nature

Istisna or construction order contract is an agreement between two natural or legal persons to produce a specific commodity or construct a design to be built in the future, with its price payable at the stipulated time, either in cash or installments (Tabatabai Hisari, 2019). In the legal concept, the pre-sale contract is another name for the forward sale (*bayʿ salaf*) or sale, and a future sale (or pre-sale) is a sale in which the object of sale does not exist at the time of contracting. However, the seller undertakes to provide it later and deliver it at the agreed time. A building pre-sale contract is an agreement whereby the seller undertakes, according to the plans and specifications of the contract, to construct the apartment and deliver it to the buyer upon completion at the agreed time in return for the contractual payment (Ghavavati et al., 2015).

A pre-sale apartment contract, despite the absence of an actual sale at the time of contract conclusion, can be considered equivalent to a sale. The sale of an existing property—tangible and perceptible—is a sale in the strict sense and constitutes a prime example of a contract of sale, to the extent that the legislator in Article 338 of the Civil Code first and foremost considers this type of sale. According to Article 361 of the Civil Code, if it becomes clear that the object of the sale does not exist, the sale is void. In practice, the seller, by concluding the contract, transfers at least a share of the land to the buyer, and since the land is presently accessible, the transaction is not considered a sale of non-existent property. Furthermore, the seller is obliged to construct and deliver the apartment in accordance with the sale contract provisions, and ultimately, the pre-sale apartment contract can be analyzed within the same framework (Katouzian, 1974).

In apartment sales (if not in the form of a commitment to sell), after the completion of construction, what has been completed will belong to the buyer, who can assert this property right against the seller's creditors and any other buyer (Katouzian, 2008). In pre-sale apartment contracts, if the seller breaches the agreement and fails to construct exactly as stipulated, it can be contested, as the constructed apartment would not be the one agreed upon by the parties. Thus, the buyer has no property right over it, and the pre-seller's obligation would not have been fulfilled, making it unjust. However, customary equivalence between the constructed apartment and the agreed apartment may be deemed sufficient. If the constructed apartment matches the reserved apartment in the contract, the contract should be considered valid, but the buyer, if dissatisfied, may exercise the right to rescind. This right of rescission does not contradict the preservation of the contract and the claim for damages due to the seller's non-performance (Shahidi, 2006).

According to Article 1 of the Building Pre-Sale Law, the pre-seller is a natural or legal person who, at the time of contract conclusion, transfers the existing superstructure (at least the building foundation) and sometimes the land intended for construction to the pre-buyer and undertakes to construct or complete it within a specified period. The pre-seller is either the official owner of the land (Article 1, Clause 1, Note 1) or the lessee of the land who, under an official deed, has the right to construct a building on the leased property (Clause 2, Note 1) and has begun construction, pre-selling it under Article 1. Since the landlord cannot compel the tenant to demolish the building, the structure remains in the possession of a third party (the pre-buyer), and the tenant (pre-seller) is only obliged to pay rent for the land to the landlord. Notably, in Clause 2 of the Note, the pre-seller is not the landowner to transfer the land ownership to the pre-buyer, as in the case of endowed (*waqf*) or government

lands, ownership transfer is never possible, even by agreement. In privately owned lands, although the lessee may purchase the leased property from the landlord, Clause 2 only refers to the right to construct on the land, not to the ownership of the land, which may have negative consequences for the pre-buyer. For instance, if the pre-buyer never becomes the owner of the land beneath their apartment, it is unclear for how long they must pay rent to the landowner, or who would be responsible for paying it. Such an issue, even if irrelevant for government or endowed lands, will undoubtedly arise in private lands, causing serious problems for the pre-buyer. Therefore, it seems that the Building Pre-Sale Law should not have permitted the lessee of the land (especially in the case of private land) to conclude a pre-sale building contract (Abhari & Taghipour Darzi Naqibi, 2018).

Article 1 of the Building Pre-Sale Law states: "Any contract under any title whereby the official owner of the land (pre-seller) undertakes to construct or complete a specified building unit on that land, and the said unit, regardless of its usage type, is to be transferred at the outset, during construction, or after completion to the ownership of the other party to the contract (pre-buyer), shall be deemed a 'building pre-sale contract' under the provisions of this Law." Therefore, before examining the nature of such contracts, it is necessary to briefly explain the concept of ownership (Tabatabai & Kiai, 2014).

In Islamic jurisprudence, ownership (*milk*) in the general sense is conceived in four stages:

1. **Real ownership**, which is absolute sovereignty belonging to God.
2. **Ownership of a human over themselves**, their organs, actions, and obligations.
3. **Physical ownership**, which is the condition resulting from the physical encirclement of one object by another, referred to as *jiddah*, and is an external attribute inherent to a physical entity.
4. **Constructive ownership** according to rational convention, which is not a physical attribute and thus does not require an external subject, such as *zakāt* and *khums*, which are granted to the poor and *sayyid*, or obligations in forward sales (*bayʿ salaf*) and similar transactions. In jurisprudence and law, the focus is on this fourth stage of ownership, which is based on legal fiction and does not inherently require a physical subject (Tabatabai & Kiai, 2014).

Thus, ownership is a purely constructive concept, and its establishment is inherently dependent on its legal recognition, with all the rules of constructive matters applying to it. It is therefore said that ownership differs from sovereignty, as ownership is not contingent upon the owned party, while sovereignty depends on the existence of a subject over which control is exercised. For instance, a person can own their debt (*mā fī al-dhimmah*), resulting in its transfer and extinguishment, but cannot exert sovereignty over themselves, as sovereignty logically requires two distinct parties and cannot be reduced to one (as in the case of the right of pre-emption or option rights). In contrast, ownership is a relationship between owner and owned and does not require a separate owned party for its validity (Tabatabai & Kiai, 2014).

3. Principles of a Pre-Construction Contract

In drafting an *istisna* contract, adherence to the following five principles is essential:

1. The first and most important element is the employer (*mustasniʿ*), meaning the party who orders the construction of a specified product or the creation of a particular design for another commodity (creator, contractor).
2. The second element is the order recipient (builders or contractor): the party who undertakes to construct a specific product or a unique design with particular specifications and to deliver it to the other party within a set period.
3. Another element is offer and acceptance: like other contracts, this contract may be concluded verbally, in writing, or through conduct that demonstrates the will and consent of the parties.
4. The subject of the contract (*mawḍūʿ al-istisnāʿ*) is another component: the product or design that, with specific characteristics and conditions stated in the contract text or order, forms the basis of the construction. Construction according to these conditions leads to mutual agreement between the parties.
5. The final element is the contract cost: the amount payable by the employer for the performance of the agreed works within the timeline, to be paid to the builder of the commodity or the project contractor (Mahdi Taleqan Ghaffari, 2018).

4. Conditions of a Pre-Construction Contract

4.1. Clarity of the Contract Subject

The quantity, type of materials, quality, and size of the ordered product must be clear and specified so that any ambiguity in the transaction is removed. Article 216 of the Civil Code provides that a transaction must not be ambiguous, except in certain cases where general knowledge suffices. Article 342 of the same Code stipulates that the quantity, type, and description of the object of sale must be known, with quantity determined according to weight, percentage, number, area, or customary measures. Naturally, this requirement is not exclusive to sales contracts and applies to all contracts that result in ownership transfer (Quan Gan, 2021).

4.2. Method of Payment

Alongside Article 338 of the Iranian Civil Code, which requires the object of sale and its price to be determined, Article 339 states: after agreement between seller and buyer regarding the sale and its price, the contract is concluded through offer and acceptance, and before offer and acceptance, payment of the price occurs; a sale with an unknown or ambiguous price cannot be validated. While the prices of goods in the market constantly fluctuate without reassuring stability, reliance on market price under such circumstances amounts to reliance on uncertainty, which entails deception and, consequently, invalidates the transaction (Quan Gan, 2021).

4.3. Specified Delivery Time

Article 344 of the Civil Code states: "If no term is stipulated in the sale, or the delivery of the object of sale or return of the price is not determined, the sale is absolute, and the price is assumed to be payable immediately, unless otherwise provided by regulation. In commercial transactions, the existence of a term is customary even if not stated in the contract." This article implies that immediate payment is presumed unless a term is agreed upon. In an *istisna* contract, specifying the delivery time is crucial, and for each installment of the price, a corresponding timeline should be set. If the delivery time is unknown, the contract effectively includes an uncertain term, leading to ambiguity in the price and ultimately invalidating the transaction. Therefore, in an *istisna* contract, the delivery time must be determined according to established custom or explicitly stated (Mertcan, 2016).

5. Essential Conditions for Concluding a Real Estate Pre-Sale Contract

Regarding the legal nature of the building pre-sale contract, based on the analyses conducted, it has been established that this contract, under the new law, constitutes a named contract, and its adaptation to other contracts lacks legal justification. Thus, since the conclusion of a contract may, in addition to the essential conditions in Article 191 of the Civil Code, require one or more specific conditions and reaching agreement on them, it is necessary to examine whether a pre-sale contract has specific conditions for its formation, or whether it is concluded and effective merely by meeting the general conditions for the validity of transactions, thus receiving legal protection.

It should be noted that general conditions apply to all contracts, except in exceptional cases defined by law, regardless of whether they are named or unnamed contracts. In contrast, specific conditions of certain contracts are not shared by all contracts and are required only for one or a few contracts (Shahidi, 2012). This means each contract may have unique conditions, and failure to meet them results in the contract not being formed.

With regard to the specific conditions for concluding a pre-sale contract, it is necessary to examine Articles 3 and 4 of the Building Pre-Sale Law. Article 3 provides: "A pre-sale contract, as well as the assignment of rights and obligations arising from it, must, in compliance with Article 2 of this Law, be executed in the form of an official deed at notary public offices, recorded in the title deed, and a summary sent to the local registration office." Article 4 states: "The execution of a pre-sale contract is subject to the presentation of the following documents: (1) the official ownership deed or an official lease deed with the right to construct, or an official contract indicating that the subject property has been allocated to the pre-seller in exchange

for investment with the right to sell through construction on the land; (2) the building permit for the entire building and an independent technical file for each unit; (3) the insurance policy related to liability under Article 9 of this Law; (4) the supervising engineer's certificate confirming the completion of the building's foundation; and (5) the response to the inquiry from the local real estate registration office. *Note*: In developments where the pre-seller has obligations toward the permit-issuing authority, such as site preparation and the creation of public and service spaces with the payment of governmental and public fees under supervision, the pre-sale of the said units is contingent upon at least thirty percent completion of the total obligations and their confirmation by the permit-issuing authority." (Shahidi, 2012).

Regarding Article 3, which refers to the requirement of concluding a pre-sale contract in the form of an official deed, it should be noted that, as mentioned in the discussion on the characteristics of the contract, the legislator in Article 3 of the Building Pre-Sale Law uses the term "must." Additionally, Articles 23 and 24 address the execution of official deeds and their criminal sanctions. Therefore, a building pre-sale contract under the new law is a formal contract, and its execution in the form of an official deed is a condition for its formation and validity, not merely proof of its existence. Thus, a pre-sale contract is a formal contract because failure to comply with these formalities results in the contract not being concluded under the Building Pre-Sale Law and only forming a contract subject to the general rules of the Civil Code (Shahidi, 2012).

As for Article 4 of the Building Pre-Sale Law, it might at first appear that obtaining and presenting these documents to the contract-executing authority is among the specific conditions for concluding the contract. However, in reality, the provision of these documents is a precondition for executing the contract at the notary public office, as the opening clause of the article implies that until these documents are provided to the contract-executing authority, the contract cannot be concluded. In other words, the conditions mentioned in Article 4 must be met before negotiations and agreement between the pre-seller and pre-buyer, and the pre-seller is obliged to obtain these documents before any advertising or promotion of the pre-sale. The pre-seller must then obtain permission from the competent authorities to publish advertisements, and it appears that such authorities will issue the permit only after verifying these conditions, since the note to Article 4 makes the permission to pre-sell contingent upon thirty-one percent completion of the total obligations and their confirmation by the permit-issuing authority (municipality). It is thus logical that permission to advertise the pre-sale would be granted only after permission to pre-sell the units themselves. Therefore, it seems that the conditions in Article 4 are preconditions for executing the contract, not specific conditions for its conclusion. This means it is possible for a pre-seller to conclude a contract with a pre-buyer without meeting one or more of the conditions in Article 4, although in that case the agreement would not fall under the Building Pre-Sale Law but would instead be subject to general civil law rules (Shahidi, 2012).

Although we have emphasized that the conditions in Article 4 are preconditions for executing the contract rather than specific conditions for its conclusion, it is appropriate here to briefly discuss each clause of the article and the requirement to obtain permission to publish advertisements before promotion, as another precondition for executing a building pre-sale contract (Shahidi, 2012).

6. Legal Effects of Pre-Sale Contracts

6.1. Seller's Obligations

The pre-sale or pre-construction contract, as one of the *innominate* contracts under Article 10 of the Civil Code, is open to discussion and analysis. Primarily, in order to prevent potential abuses by either the pre-seller or the pre-buyer, the construction contract should be considered necessary where permitted, in terms of rescission rights. The rationale behind this is a fundamental principle of contracts: the parties must not have the right to disrupt the contract except through the creation of an option (*khiyār*), rescission, or the occurrence of a cause for rescission. The seller in pre-sale or construction order contracts is obliged to fulfill commitments that are elaborated in three sub-sections.

6.1.1. Construction and Completion of the Apartment (Building) Under Contract

The commitment to construct and complete the apartment is the seller's most important obligation toward the buyer. This means the seller must build the pre-sold apartment (or building) for the buyer within the stipulated period, in accordance with the contract. However, the buyer is obligated to accept delivery of the apartment at the agreed time, but the seller cannot force

them to take it "as is." Under Article 22 of the Building Pre-Sale Law, it is not permissible to engage in pre-sale before construction has progressed by at least ten percent (Tabatabai, 2017).

6.1.2. Delivery of the Apartment Within the Agreed Timeframe

Articles 333 and 384 of the Civil Code, in relation to Article 7 of the Building Pre-Sale Law, limit the buyer's right to rescind the contract price and stipulate that restitution of the price is based on the contract rate. Article 7 grants a number of advantages to the buyer, including the right to rescission and compensation for damages, where the floor area is valued at the current market rate. If the actual amount is greater or less than the contractual amount, the difference is calculated based on the rate stipulated in the contract. Delivering a unit and executing the official deed, as required in Clause 7 of Article 2 of the Building Pre-Sale Law, constitutes the ultimate objective of pre-sale contracts, and the delivery deadline must be specified at the outset of the agreement. Determining this time impacts other matters as well:

1. Part of the contract price is paid upon delivery of the building (apartment) and final transfer, so the delivery date and deed execution date also define when this installment is due.
2. According to Clause 4 of Article 6 of the Law, if the pre-seller does not deliver the entire building or part of it, or does not transfer the official deed to the buyer within the agreed time, they are obliged to pay a stipulated delay penalty. Thus, the late penalty that the pre-seller actually pays is calculated from the due date of delivery or deed execution, as applicable.
3. At least ten percent of the transaction price is paid on the date the final deed is executed (Reza Nik Khah et al., 2019).

It should be noted: if the delivery date is not specified in the contract, the agreement is invalid, since the pre-seller could indefinitely delay construction to the buyer's detriment. However, if the delivery date exists but the final transfer date is unspecified, the contract remains valid because, under Article 4 of the Building Pre-Sale Law, the pre-buyer may still request transfer of ownership from the notary. In such a case, the delay damages under Clause 4 of Article 6 would not be claimable, as they are calculated based on a specified final transfer date, which is absent in this scenario.

6.1.3. Execution of the Official Transfer Deed

Under Clause 2 of Article 238 of the Civil Code, written documents are among the evidentiary means in litigation. While the legislator here calls such evidence "written documents," in Article 284 they elaborate on the definition, effects, and value of such documents, namely any written record that can be attributed to a claim or defense. The legislator limits evidentiary value to written documents, excluding non-written evidence. Prior to the introduction of Article 286 of the Civil Code, Iranian law did not divide deeds into official and unofficial. This changed with the establishment of the Real Estate Registration Office, notary public offices, and modern civil institutions. As civil society and transactions grew, the legislator found it necessary to distinguish official from unofficial deeds, granting the former advantages not available to the latter, to encourage their use.

According to Article 6 of the Building Pre-Sale Law, if the pre-seller fails to deliver the pre-sold apartment unit to the buyer within the agreed time, or fails to fulfill their obligations, they must— in addition to performing Clause 9 of Article 2 of the Law—pay the buyer late penalties as follows, unless a higher amount is agreed in favor of the buyer:

1. If the pre-sold apartment unit and its private sections such as parking and storage are unusable at the agreed date, a daily payment equivalent to the rental value (*ujrat al-mithl*) of the undelivered portion until delivery.
2. In case of non-performance of reciprocal obligations, a daily payment of 0.5% of the current value of the unfulfilled obligations relative to the buyer's share.
3. In case of non-performance of public service obligations under Clause 9 of Article 2, such as streets, gardens, mosques, schools, etc., a daily payment of 0.001 of the value of the fulfilled obligations relative to the buyer's share.
4. In case of failure to timely execute the official transfer deed, a daily payment of 0.001 of the contract value (Tabatabai & Kiai, 2014).

This provision imposes a heavy legal burden on the pre-seller, since delays can result in substantial penalties. For example, Clause 4 of Article 6 obliges the pre-seller to pay 0.001 of the transaction value per day of delay in executing the deed. If the

delay extends to about three years, the pre-seller may be compelled to return the received price, deliver the building (apartment), and transfer the official deed, or in case of further delay, pay from their own funds. Importantly, since the legislator specifies that the parties cannot agree to reduce the occurrence or rate of these penalties, there is no escape for a defaulting pre-seller. Although the Law is part of public order, preventing the parties from contracting otherwise, there may still be differing interpretations. The legislator thus voids any agreement aimed at reducing these penalties. This effectively incentivizes pre-buyers to execute pre-sale contracts through official deeds, as the heavy consequences either ensure timely completion or at least mitigate losses. Nevertheless, this is not a perfect solution, as the pre-seller might prefer halting construction to continuing it, in which case monetary penalties may not suffice. It would have been better if the legislator had stipulated an ownership share in the land for the pre-buyer, so that if the project failed to deliver the units, the pre-buyer would own a specified portion of the project land to offset their payments (Gharibe & Masoudi, 2012).

Under the Building Pre-Sale Law, specifically Article 3, the pre-buyer becomes the owner of the building proportionally as installments are paid. This provision ends many legal disputes, as the pre-buyer can invoke these rights proportionate to the paid installments. Upon completion of the contract and the building (apartment), with the supervising engineer's confirmation, and if all installments are paid or an exchange contract is executed, the pre-buyer can request execution of the official transfer deed at a notary public office (Ghavavati et al., 2015).

6.2. Buyer's Obligations

In a pre-sale contract, the buyer undertakes obligations toward the seller, as follows: If the law did not specify the determination of the price and the method of installment payment, the parties themselves would need to agree on this. However, it is noteworthy that Article 3 of the Building Pre-Sale Law refers to Clauses 3 and 6 of Article 2, stating that in a building pre-sale contract, the installment payment of the agreed price will be by mutual agreement of the parties, but at least ten percent of the price must be paid upon execution of the final deed, and the parties may not agree otherwise. According to the principle in Article 237 of the Civil Code, if the obligor fails to perform the contract, the obligee must first refer to the court, which may leave the obligee entangled in lengthy proceedings. According to Article 4, if the seller does not complete the project by the end of the contract period, but the supervising engineer certifies that only minor stages remain for completion (less than ten percent), the seller may, by agreeing to finish the remaining work, refer to the notary public office to request execution of the official deed to the extent of their share (Mohammadi Sam, 2012).

6.2.1. Payment of the Price in the Agreed Installments

The first and most important obligation of the pre-buyer is to pay the price or consideration of the transaction in accordance with the contract, which in a pre-sale agreement will be paid in installments during various stages of construction (Clauses 5 and 6 of Article 2 and Articles 11 and 13). According to Article 11 of the Building Pre-Sale Law, the method of paying the price installments will be as agreed by the parties, but at least ten percent of the price must be paid upon execution of the final deed, and the parties cannot agree otherwise. Therefore, the pre-seller and pre-buyer cannot agree that the entire price be paid before execution of the final transfer deed. It should be noted that any agreement contrary to this provision is invalid under Article 232 of the Civil Code because it conflicts with a mandatory rule of law (Daroui, 2012). The legislator introduced this requirement to ensure that the pre-seller completes the building and formally transfers it to the pre-buyer at the agreed time.

Since Article 13 provides that the pre-buyer becomes the owner of the pre-sold property proportionate to the installments paid, non-payment of installments means the buyer does not acquire ownership and gives the pre-seller the right to rescind under Article 16. However, if the pre-seller delays in fulfilling their obligations, the pre-buyer may temporarily suspend installment payments under Article 12. This is because in bilateral contracts (*ʿuqūd muʿāwaḍah*), the parties' obligations are reciprocal and interdependent, and each party may make performance conditional upon the other party's performance—a right known in legal terms as "right of retention" (*ḥaqq al-ḥabs*). The logical consequence of this relationship is that the performance of each party's obligation is suspended until the other party performs (Shiravi, 1998).

6.2.2. Taking Delivery of the Building

In return for the pre-seller's obligation to deliver the building on time, the pre-buyer is obliged to take delivery (*tasallum*) after construction and completion of the building. When the unit is ready for use, the pre-seller (whether a natural or legal person) must notify the pre-buyer in writing to come within a specified period to take delivery. Delivery may occur before, after, or simultaneously with execution of the official deed.

Although the legislator, in Article 6 of the Building Pre-Sale Law, provides for damages or rescission as remedies for the pre-seller's failure to deliver on time, no explicit sanction exists for the pre-buyer's failure to take delivery within the set time. However, it appears that if the pre-buyer fails to collect the building on time, they must pay all taxes, legal fees, and building maintenance costs from the date of expiry of the delivery deadline (Khaniyan, 2008). Moreover, if the failure to collect persists for a long time, the pre-seller will have the right to rescind the contract.

7. Effect of the Pre-Sale Contract in Iranian and Canadian Law

Even today, with technological advances bringing new forms of construction, the human need for buildings remains fundamental, and the construction of large buildings requires substantial capital. Major projects cannot be undertaken easily or individually without prior financing. Thus, pre-sellers can use pre-buyers' funds for construction, and pre-buyers can secure part of their future needs through early payment. In Iran, apartment living does not have a long history. Among Iranian cities, especially Tehran—due to decades of migration and rapid population growth—apartment living has spread widely. This phenomenon led the legislator, in 1964, to enact the Apartment Ownership Law. Today, apartment transactions are among the most common forms of real estate sales (Simiyeh Davarpanah Bordar & Rahmani, 2022).

The apartment pre-sale contract is one that has grown significantly with the industrialization of societies. The most important legal issue concerning these contracts is their nature. In Iran, despite the enactment of the Building Pre-Sale Law on 2 January 2011, ambiguity remains regarding the nature of these agreements. This is because the Building Pre-Sale Law is primarily formal in nature and does not address the substantive nature of such contracts. In recent years, rising housing prices combined with declining purchasing power and increasing inflation have greatly boosted the prevalence of pre-sale contracts. Alongside the growth of pre-sale transactions, related legal disputes have also sharply increased. In many cases before the Building Pre-Sale Law, individuals sold unfinished apartments to multiple buyers. Buyers, aiming to purchase below market prices, paid for pre-sale units, only to later discover that no such property existed or that the same unit had been sold to multiple people. The increase in fraud stems from the fact that in most of these transactions, the property is not visible to the buyer, who is made to sign an acknowledgment such as "The property has been seen by the buyer, who is aware of all details," thereby releasing the seller from responsibility. For this reason, a well-drafted and precise contract is crucial in such transactions. Certain clauses in pre-sale contracts can prevent these issues, and both parties must ensure all terms are in writing and signed; oral agreements are insufficient to remove ambiguities, as differing interpretations can lead to disputes. Furthermore, specific laws on pre-sale contracts exist, including the law issued in September 2020 (Katouzian, 1974).

8. Conclusion

Based on the analyses conducted in this article, it is concluded that pre-construction or *istisna* contracts have their own specific rules and legal effects. A building pre-sale contract, despite the absence of an actual sale at the time of its conclusion, can be regarded as equivalent to a sale. Compliance with the general conditions of transactions—namely the intention and consent of the parties, their legal capacity, the subject matter of the transaction, and the legitimacy of the transaction—is essential. In such contracts, the provision of raw materials and the production (construction) of the ordered item is the responsibility of the builder (manufacturer), and the finished product must be specified in terms of material, type, size, qualities, and characteristics, with the delivery date clearly stated. Price determination is also a critical element and must be agreed upon in the contract for payment to the builder.

Under the principle of necessity and Article 219 of the Civil Code, this contract is binding unless it is rescinded by mutual consent or dissolved for a legal reason. The builder's obligation to perform the work and construct the product is an obligation to achieve a result. In other words, the aim of an *istisna* contract is the realization of the promised outcome, and under Articles

221 and 226 of the Civil Code, the builder is bound to achieve that result. If performance is not carried out or is delayed, the builder is liable to compensate the resulting damages unless it is proven that the failure or delay was due to an event beyond their control or outside the contract, which would exempt them from liability.

According to Article 1 of the Building Pre-Sale Law, any contract, regardless of its title, in which the official owner (pre-seller) undertakes to construct or complete a specific building unit on a piece of land, and such unit—regardless of its use—is transferred at the outset, during construction, or after completion to the ownership of the other party (pre-buyer), is considered a "building pre-sale contract" under the provisions of this law.

From the study and analysis of the nature, characteristics, and legal effects of real estate pre-sale contracts, the following findings were obtained:

1. Regarding the legal nature of the building pre-sale contract, there are two major viewpoints—one considers it a sale, and the other regards it as a private contract. However, under the new Building Pre-Sale Law, it is a combination of a land sale and a construction obligation for the future, ultimately constituting a special contract with its own distinctive characteristics.
2. In terms of contractual classification, the building pre-sale contract is a binding, named, reciprocal, bilateral, consensual, multi-obligation, instantaneous, and compulsory contract.
3. The pre-seller's rights include: a) Suspension of contract performance due to force majeure.
4. b) Contract adjustment.
5. c) The right to receive and claim the agreed consideration. However, the legislator has not explicitly addressed these rights in the Building Pre-Sale Law, possibly assuming their obviousness, though it would have been prudent to foresee, at least, provisions for contract adjustment to prevent potential disputes. The omission of adjustment provisions is a legislative shortcoming.
6. The pre-seller's obligations include: a) Constructing or completing the building or pre-sold unit in accordance with the contract specifications and building plans.
7. b) Delivering the building.
8. c) Paying damages for delayed performance.
9. d) Executing the official transfer deed.

In Canadian law, the pre-seller's obligations can also be classified into four categories. The two primary obligations, similar to Iranian law, are the obligation to construct and complete the apartment and to deliver it on time. The third category concerns the performance of express contractual terms in full, while the fourth relates to implied contractual terms. The most important rights of the pre-seller in Canadian law include the right to demand the price and the right to obtain instructions and information regarding the subject of the contract from the pre-buyer.

Based on the conclusions drawn above, the following recommendations are offered regarding the nature, conditions, and legal effects of real estate pre-sale contracts in Iranian and Canadian law:

First, the absence of provisions similar to those in Canadian civil law in the Iranian legal system requires the adoption—either directly or with modifications—of such laws into Iranian legislation, as was done with the Civil Liability Act and moral damage provisions. However, several important considerations should be kept in mind in this regard:

1. Given the large number of court cases concerning the transfer of immovable property, particularly in relation to building pre-sales, and considering that the current Civil Code cannot adequately address the issues of buying, selling, and constructing completed, under-construction, or not-yet-constructed buildings, it is advisable to adopt a fresh approach, similar to Canadian law, to resolve these matters. Canada's Civil Code, which has been amended and updated since 1804, offers a model for introducing new provisions to meet modern legal challenges, and Iran should do the same in light of contemporary issues.
2. Municipalities should prepare a "Pre-Sale Title Document" and, upon issuing a building permit, record it in the relevant file in accordance with the building units stated in the permit.
3. For each unit the seller intends to sell—whether through an official transfer at a notary public or by preliminary agreement—the municipality should send one copy of the document to the local registration office and keep another copy in the municipal file. This pre-sale document should bear a number, date, details of the building unit, information about the seller and buyer, and the stamp and signature of the municipal authority.

Ethical Considerations

All procedures performed in this study were under the ethical standards.

Acknowledgments

Authors thank all who helped us through this study.

Conflict of Interest

The authors report no conflict of interest.

Funding/Financial Support

According to the authors, this article has no financial support.

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